

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION**

VIRGINIA INNOVATION SCIENCES, INC.,

Plaintiff,

v.

AMAZON.COM, INC., et al.

Defendants.

Civil Action No. 4:18-cv-00474-ALM

(LEAD CONSOLIDATED CASE)

JURY TRIAL DEMANDED

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INNOVATION SCIENCES, INC.,

Plaintiff,

v.

RESIDEO TECHNOLOGIES, INC,

Defendant.

Civil Action No. 4:18-cv-00475-ALM

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INNOVATION SCIENCES, INC.,

Plaintiff,

v.

HTC CORPORATION

Defendant.

Civil Action No. 4:18-cv-00476-ALM

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INNOVATION SCIENCES, INC.,

Plaintiff,

v.

VECTOR SECURITY, INC.

Defendant.

Civil Action No. 4:18-cv-00477-ALM

**DEFENDANTS' SUR-REPLY IN RESPONSE TO MOTION TO  
ENTER DISPUTED AMENDMENTS TO THE DOCKET CONTROL  
ORDER, DISCOVERY ORDER, AND PROTECTIVE ORDER**

The undersigned Defendants respectfully submit this sur-reply to Plaintiff's Opposed Motion to Enter Disputed Amendments to the DCO, Discovery Order, and PO (Dkt. 84).<sup>1</sup>

## **I. DOCKET CONTROL ORDER**

### **A. Modified 4-2 Deadline**

The need to extend the deadline for P.R. 3-3 Invalidity Contentions is a consequence of addressing the sheer number of claims Plaintiff asserted: over 200 against Amazon, over 100 claims against HTC, and variously overlapping claims against the other defendants. A minor extension of less than a week is necessary for Defendants to coordinate, prepare, and exchange preliminary claim constructions and extrinsic evidence under P.R. 4-2 after serving Invalidity Contentions. Plaintiff argues that "the two-week period for preparing the JCCS is already on an accelerated basis given that the local rules provide for 30 days between those two events," (Mot. at 3) but ignores the fact that Defendants are left with a one-day period between P.R. 3-3 and 4-2 disclosures, when the same local rules provide for 30 days between these two events. Defendants' proposal reasonably splits the time between these deadlines, and the only reason Defendants requested more than a three-day extension is due to the Easter holiday.

### **B. Disclosure Obligation and Deadlines**

Contrary to Plaintiff's characterization, under Defendants' proposal, which simply carries

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<sup>1</sup> Defendants agree that a joint submission describing the parties' disputes with respect to the proposed amendments to the case management orders would have been better than briefing a disputed motion. But Plaintiff's contention that "[h]ad Defendants simply indicated it [sic] needed more time, Innovation would have accommodated a later exchange time – avoiding the back and forth briefing now occurring" is incorrect. On the deadline for submission of the proposed amendments, Defendants did suggest that the parties request a short extension so that they could meaningfully confer further and identify and minimize areas of disagreement in a form that would be most helpful to the Court. Plaintiff informed Defendants at 5:25 PM CDT that it declined to agree to any extension, however, and, exactly one minute later, filed its opposed Motion.

over this Court’s existing scheduling orders entered in each of the pre-consolidated cases, “Mandatory Disclosures on all issues, including damages,” as described in this Court’s Order Governing Proceedings, would be required by April 17, 2019. The “Deadline for Initial Mandatory Disclosure . . . which has not been previously been disclosed” would be August 14, 2019, which is also carried over from the existing scheduling orders entered in each of the pre-consolidated cases. Plaintiff provides no reason for its reliance on practice before Judge Gilstrap to upend this Court’s October 2018 Orders and the associated deadlines, which Defendants have been working toward. Indeed, Defendants have already diligently located and produced relevant materials and information in their possession, custody, and control, and to respond to proper discovery requests, and will continue to do so.<sup>2</sup>

## II. PROTECTIVE ORDER

### A. Export Control Provision

In its reply, Plaintiff does not identify any reason for taking Defendants’ highly confidential documents and source code outside the United States. And it is reasonable to assume that it has none because it agreed to the very same export control provision just last year in its other case against Amazon. *Virginia Innovation Sciences, Inc. v. Amazon.com, Inc.*, No. 16-cv-861 (LO-MSN) (E.D. Va.) (“EDVA Case”), Dkt. 97-1 (Proposed Stipulated Protective Order) at ¶ 14.3. Now, however, Plaintiff argues that it should be able to take Defendants’ protected material overseas without restriction because *Amazon* uses manufacturers and has employees outside of the U.S. But Amazon invests millions of dollars in security protocols to safeguard its highly confidential

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<sup>2</sup> Plaintiff’s repeated references and reliance to its having produced “over 100,000 pages” of materials is irrelevant, given many of those pages are duplicative, or relate only to claims or defenses involving one of four consolidated Defendants (*e.g.*, regarding Amazon Dash Buttons, HTC smartphones, Resideo devices, or a Vector physical location in Texas) inexplicably produced to all other Defendants.

material both within and outside of the U.S., including sensitive code and documents accessed by employees overseas. Plaintiff, in contrast, cannot ensure that Defendants' protected material is safe from those who are outside of the Court's jurisdiction and either do not know or do not respect U.S. intellectual property laws.<sup>3</sup>

Plaintiff points to a case that Defendants brought to the Court's attention, and contend that the case "supports Plaintiff – not Defendant." (Reply at 6.) Plaintiff is wrong. In that case and on those specific facts—when the patentee had *already* retained a foreign document review vendor for its case—the court declined to include the defendant's requested export control provision in the protective order, but did impose restrictions on overseas access to protected material. *See Eon Corp. IP Holdings, LLC v. Landis+Gyr Inc.*, No. 11-cv-317-JDL, Dkt. 154 at 5 (E.D. Tex. June 12, 2012). Plaintiff has identified no similar facts that would make the imposition of export control restrictions proposed by the Defendants burdensome for it; it has agreed to them in the past.

If the Court does not enter a protective order with Defendants' proposed export control provision, it should at least impose the same requirement Judge Love did in the *Eon* case: "[p]rior to receiving any Protected Material, a person located outside of the United states shall (1) review the Court's protective order in [the] case, (2) agree in writing to abide by the terms of the Protective Order, and (3) submit in writing to the [court's] jurisdiction for the purpose of resolv[ing] any issues that may arise concerning the protective order, including the ability and willingness to personally appear before the [court]." *Id.* Anything less would place Defendants' confidential information at an unreasonable risk of unauthorized disclosure.

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<sup>3</sup> Amazon identified the Northern District of California's Interim Patent L.R. 2-2 Protective Order as an example of the ubiquitous nature of export control provisions. Amazon seeks protection above and beyond this default level of protection due to the particularly sensitive nature of the source code and documents likely to be produced in this case.

## B. Confidentiality Tiers

The Court’s default protective order has a single confidentiality tier and Defendants’ proposed protective order does not change the definition of that tier. (*See* Dkt. 85-1 (Redline of Defendants’ Proposed Protective Order Against Default Protective Order).) It merely adds one additional confidentiality tier—“HIGHLY CONFIDENTIAL—SOURCE CODE” (*id.* ¶ 14)—and re-names the “CONFIDENTIAL” tier as “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” (*id.* ¶ 1) for consistency.<sup>4</sup> Plaintiff has not produced any confidential source code. Thus, any documents it already designated as “Confidential” would be treated as “HIGHLY CONFIDENTIAL—ATTORNEYS’ EYES ONLY” under Defendants’ proposed protective order.

On the other hand, Plaintiff’s proposed protective order breaks up the confidential designation in the default protective order into two separate categories: “CONFIDENTIAL” and “RESTRICTED CONFIDENTIAL ATTORNEYS’ EYES ONLY,” neither of which maps to the confidential designation in the current protective order, thus requiring the parties to re-designate documents already produced and designated under the current order. (Dkt. 84-3 (Plaintiff’s Proposed Protective Order) ¶ 3.) And neither of Plaintiff’s two designations provides the same level of protection as the Court’s current protective order. The “CONFIDENTIAL” tier in Plaintiff’s proposal allows access to “in-house counsel” and designated party representatives. (*Id.* a¶ 5.) The “RESTRICTED CONFIDENTIAL ATTORNEYS’ EYES ONLY” tier limits access to “in-house counsel” “who exercise no competitive decision-making authority on behalf of the client.” (*Id.* ¶ 9.) The Court’s current protective order does not allow *any* in-house counsel or party representatives to access protected material. (Dkt. 10 at 9.) Plaintiff should have no need to expand access

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<sup>4</sup> If it helps resolve the issue, Defendants are happy to revert to the “CONFIDENTIAL” label.

to protected material to “in-house counsel,” because it has no in-house counsel and its sole employee (its CEO) is a decision maker for every aspect of Plaintiff by definition.

**C. Source Code Printing Limits**

Defendant’s source code printing limitations were acceptable to Plaintiff as recently as last year. In the prior, still pending, case between VIS and Amazon, which involved three patents and dozens of claims asserted against 14 products and services, VIS agreed to a 500-page limit on printed source code and did not seek any expansion of that limit. (*See* EDVA Case, Dkt. 97-1 (Proposed Stipulated Protective Order) at ¶ 9(j).) That protective order, like Defendants’ proposal here, allowed for modification of that limit upon a showing of good cause. Plaintiff does not explain why it needs to print more pages of source code in this case than it did in the prior case. Indeed, the only possible explanation is that it seeks to print an inordinate amount of source code so that it can review that code unburdened by the provisions for secure source code review set out in the protective order, which its proposed protective order does not prohibit. The Court should adopt Defendants’ proposed provisions for source code review.

**D. Necessity of Unilateral Prosecution Bar Applicable Only to Plaintiff**

This case is indistinguishable from *Smartflash LLC v. Apple Inc.* No. 6:13-cv-447, 2014 WL 10986995, at \*1 (E.D. Tex. May 12, 2014). None of Plaintiff’s arguments changes this conclusion. Plaintiff has offered no good faith basis why its counsel and experts should be exempted from a prosecution bar. Yet, as further shown by the attached declaration from Vector’s lead counsel, a bar proposed by Plaintiff would significantly impact his ability to practice.

Dated: April 8, 2019

Respectfully submitted,

By: /s/ Saina S. Shamilov

J. David Hadden  
CA Bar No. 176148 (Admitted E.D. Tex.)  
Email: dhadden@fenwick.com  
Saina S. Shamilov  
CA Bar No. 215636 (Admitted E.D. Tex.)  
Email: sshamilov@fenwick.com  
Ravi R. Ranganath  
CA Bar No. 272981 (Admitted E.D. Tex.)  
Email: rranganath@fenwick.com  
**FENWICK & WEST LLP**  
Silicon Valley Center  
801 California Street  
Mountain View, California 94041  
Telephone: (650) 988-8500  
Facsimile: (650) 938-5200

Todd R. Gregorian  
CA Bar No. 236096 (Admitted E.D. Tex.)  
Email: tgregorian@fenwick.com  
Dargaye Churnet  
CSB No. 303659 (Admitted E.D. Tex.)  
Email: dchurnet@fenwick.com  
Sapna Mehta  
CA Bar No. 288238 (Admitted E.D. Texas)  
Email: smehta@fenwick.com  
**FENWICK & WEST LLP**  
555 California Street, 12th Floor  
San Francisco, CA 94104  
Telephone: 415.875.2300  
Facsimile: 415.281.1350

Jeffrey Ware  
CA Bar No. 271603 (Admitted E. D. Tex.)  
Email: jware@fenwick.com  
**FENWICK & WEST LLP**  
1191 Second Avenue, 10th Floor  
Seattle, WA 98101  
Telephone: 206.389.4510  
Facsimile: 206.389.4511

***Counsel for Defendants***  
**AMAZON.COM, INC.,**  
**AMAZON DIGITAL SERVICES LLC,**  
**AND AMAZON WEB SERVICES, INC.,**

Dated: April 8, 2019

Respectfully submitted,

By: /s/ J. Thad Heartfield

J. Thad Heartfield  
Texas Bar No. 09346800  
thad@heartfieldlawfirm.com  
M. Dru Montgomery  
Texas Bar No. 24010800  
dru@heartfieldlawfirm.com  
Stephen L. Townsend  
Texas Bar No. 24071539  
stephen@heartfieldlawfirm.com  
The Heartfield Law Firm  
2195 Dowlen Road  
Beaumont, Texas 77706  
Phone: 409.866.3318  
Fax: 409.866.5789  
Brett Williamson (*Pro Hac Vice*)  
bwilliamson@omm.com  
Cameron Westin (*Pro Hac Vice*)  
cwestin@omm.com  
**O'MELVENY & MYERS LLP**  
610 Newport Center Drive, 17th Floor  
Newport Beach, CA 92660  
Telephone: 949-823-6900  
Facsimile: 949-923-6994

Brian Berliner (*Pro Hac Vice*)  
bberliner@omm.com  
**O'MELVENY & MYERS LLP**  
400 S. Hope Street  
Los Angeles, CA 90071  
Telephone: 213-430-6000  
Facsimile: 213-430-6408

Melody Drummond Hansen (*Pro Hac Vice*)  
mdrummondhansen@omm.com  
**O'MELVENY & MYERS LLP**  
2765 Sand Hill Road  
Menlo Park, CA 94025  
Telephone: 650-473-2600  
Facsimile: 650-473-2601

**Attorneys for Defendant  
RESIDEO TECHNOLOGIES, INC.**



Dated: April 8, 2019

Respectfully submitted,

By: /s/ Philip Ou

Yar R. Chaikovsky  
CA Bar No. 175421  
yarchaikovsky@paulhastings.com  
Philip Ou  
CA Bar No. 259896  
philipou@paulhastings.com  
1117 S. California Avenue  
Palo Alto, California 94304-1106  
Telephone: 1(650) 320-1800  
Facsimile: 1(650) 320-1900

Harry L. Gillam, Jr.  
TX Bar No. 07921800  
GILLAM & SMITH LLP  
303 S. Washington Ave.  
Marshall, Texas 75670  
Telephone: (903) 934-8450  
Facsimile: (903) 934-9257  
gil@gillamsmithlaw.com

**Attorneys for Defendant  
HTC CORPORATION**

Dated: April 8, 2019

**FISH & RICHARDSON P.C.**

By: /s/ Bret T. Winterle

Neil J. McNabney  
Texas Bar No. 24002583  
njm@fr.com  
Bret T. Winterle  
Texas Bar No. 24084249  
winterle@fr.com  
Michael A. Vincent  
Texas Bar No. 24105738  
vincent@fr.com  
1717 Main Street, Suite 5000  
Dallas, Texas 75201  
(214) 747-5070 (Telephone)  
(214) 747-2091 (Facsimile)

**Attorneys for Defendant  
VECTOR SECURITY, INC**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on April 8, 2019.

/s/ Bret T. Winterle

Bret T. Winterle